

43. SUBJECTS OF BARGAINING

43.11: Compensation – Wages and Salaries

“Salaries are a mandatory subject of bargaining and are therefore a legally negotiable item.” **ULP #7-80**

See also **ULPs #14-74 and #34-80.**

See **ULP #10-86.**

43.113: Compensation – Wages and Salaries

See **ULP #37-81 Montana Supreme Court (1985).**

43.120: Compensation – Wages and Salaries – Salary Schedule

“The School District’s argument that initial placement on a negotiated salary schedule is within its hiring prerogative and is not a negotiable item holds little merit.” **ULP #7-80**

“Placement on a salary matrix can only be considered a ‘wage’ matter and would have the utmost of direct impact on an individual.... [T]he District’s five-year maximum experience policy is a mandatory subject of bargaining.” **ULP #34-80**

The question was “Whether the Defendant’s refusal to bargain on the transfer of union members from the Statewide Classification Pay Plan to the Blue Collar Classification and Pay Plan was a violation of Section **#39-31-401(5) MCA**. This identical question was addressed in ***Local Union 254, Laborers International Union v. Ellen Feaver, in her capacity as Director, Department of Administration, State of Montana, Cause No. ADV 85-043, District Court, First Judicial District State of Montana in and for the County of Lewis and Clark (Feb., 1985)***.... Upon review, the Court found that the construction of the State statutes in question (Collective Bargaining Act for Public Employees; State Employees Classification and Pay Act) involved a ‘profound exercise of discretion’ and no clear legal duty exists. The court dismissed the Petitioner’s request for alternative writ of mandate [ordering the Respondent to immediately negotiate the transfer of bargaining unit members from the Statewide Classification and Pay Plan to the Blue Collar Classification and Pay Plan] and observed the decision on construction of the statute should be left to the agency responsible for the decision.... The parties do agree that the proper method of moving employees from the Statewide Classification and Pay Plan to the Blue Collar Classification and Pay Plan is through the collective bargaining process.” **ULP #10-86.**

See **ULP #29-86.**

43.123: Compensation – Wage and Salaries – Termination and Severance

See **ULO #18-78.**

43.13: Compensation — Benefits

“Black’s Law Dictionary, Abridged Fifth Edition defines fringe benefits as: ‘Side non-wage benefits which accompany or are in addition to a person’s employment such as paid insurance...sick leave...etc. Such benefits are in addition to regular salary or wages and are a matter of bargaining in union contracts.’” ULP #34-87

See also **ULP #13-90.**

43.131: Benefits – Health Insurance

The city must pay the same amount for policemen’s insurance as is paid for other city employees even though a different carrier is involved.” **ULP #11-75**

43.1331: Compensation — Benefits — Disability Benefits — On-the-Job

See **ULP #34-87.**

43.14: Compensation – Employee Services

Because it is not mandatory that teachers live in this housing, “we do not find housing and utilities to be related to the individual well-being of the teacher.... There is nothing that makes the subject an illegal subject of bargaining. Therefore we find it to be a permissive subject of bargaining.” **ULP #13-76**

43.142: Compensation – Employee Services – Cafeteria Services

See **ULP #17-77.**

43.15: Compensation — Holidays and Vacations

See **ULP #3-90.**

43.151: Compensation — Holidays and Vacations — Legal Holidays

“The County’s offer to provide the statutory holidays complies with the statute in terms of days recognized as holidays.... The law provides that work on a legal holiday, be it Sunday or otherwise, is compensable with either the regular day of pay plus another day of pay or in lieu of that the regular day of pay plus a day

off at a later date. See **38 AG Opinions #16, 1979**. There is no provision that provides for time and one half payment. But for the language in the expired contract and the language in the County's last offer there would be no requirement for time and one half for any holiday, be it Sunday or otherwise." **ULP #7-89**.

See also **ULP #31-89**.

43.153: Compensation — Holidays and Vacations — Accrued Vacation Credit

See **ULP #8-92**.

43.16: Compensation – Leave

Emergency situations "is clearly a matter which must be bargained." **ULP #5-77**

43.168: Compensation – Leave – Sick

See **Rippey v. Flathead Valley Community College (1984)**.

43.211: Hiring and Dismissal – Recruitment – Hiring Practices

"Procedures for advertising job vacancies are a mandatory subject of bargaining." **ULP #5-77**

43.212: Hiring and Dismissal – Recruitment – Residency Requirement

"[R]esidence is a mandatory subject of bargaining." **ULPs #5-77 and #6-77**.

43.23: Hiring and Dismissal – Dismissal [See also 43.99.]

Tenured and non-tenured dismissal are mandatory subjects of bargaining. **ULP #5-77**

"It is clear that nonrenewal of non-tenured teachers was not covered by the agreement or allowed by the law then in effect. [75-6105.1, **RCM 1947**] (See Sections **59-1601 through 59-1617, RCM 1947**, for the law presently covering collective bargaining for teachers and public employees in general.)" **Wibaux Education Association v. Wibaux High School (1978)**

"[T]he Defendant did not show a specific statutory provision that would prohibit it from agreeing to the arbitration provision relating to the nonrenewal of nontenured teachers. In using the reasoning of the Danville case, I find the Defendant is not without authority to negotiate and agree to such an arbitration provision. In fact, since 'dismissal' or 'nonrenewal' are considered a mandatory subject of bargaining under the topic of 'conditions of employment,' the

Defendant had specific authority to negotiate such an arbitration clause....” **ULP #30-79**

“Discharge has long been recognized as a mandatory subject of bargaining by the NLRB.... [T]he [Montana] Legislature could hardly have been ignorant in 1973 of the fact that the private sector had been bargaining over termination for cause (tenure) for years, and that the industries with strong and stable labor relations histories do not summarily dismiss bargaining unit members.” **ULP #31-79**

“None of the arguments made by Defendant deals with Montana public employees’ rights to bargain for tenure under the Act. The issue has not been decided by the Montana Supreme Court before...” **ULP #31-79**

“It is not illegal for the Superintendent to agree to dismiss employees only for cause and, if there is a dispute as to what good cause is, to go to an arbitrator for a final and binding decision.” **ULP #31-79**

“There was no showing of ‘just cause’ for removing Nye from her permanent status in the permit clerk position.” **Nye v. Department of Livestock (1982)**

“It is well settled that terminations and grievance procedures are negotiable subjects.” **ULP #18-83**

See also **Welsh v. Great Falls (1984)**, **Great Falls and Raynes v. Johnson (1985)**, and **In the Matter of Raynes (1985)**.

43.232: Hiring and Dismissal – Evaluation

See **ULP #43-79**.

43.233: Hiring and Dismissal – Dismissal – Termination Procedure

“Applying the test of how direct the impact of an issue is on the well-being of an individual teacher, as opposed to its effect on the operation of the school system as a whole, the conclusion is inescapable that the effect of these proposals [involving the procedures to be followed by the School District before a teacher is terminated] on the individual teacher will be substantially greater than that on the school system. What the teacher is told and when he/she is told may have a direct effect on his future employment.” **ULP #5-77**

“The Hearing Examiner made no judgment on whether contract proposals in Article VIII [Employment Status of Teachers] are meritorious. She ruled only that the general subjects are mandatory subjects of bargaining.” Those subjects are: considerations prior to termination; notice of termination (tenured and nontenured); dismissal (tenured and nontenured); notification of reelection; and

individual contract. “A number of subsections in Article VIII are matters of statute. Teachers do not have to negotiate the provisions of Montana Law, these provisions are theirs by right.” **ULP #5-77** [Hearing Examiner’s comments relating to the School Board’s exceptions.]

“The University has agreed that reinstatement is a mandatory subject of negotiations.” **ULP #7-78**”

“In this matter the Defendant has retained the ‘sole discretion’ to employ or dismiss teachers. The arbitration provision provides a review process to ensure that teachers dismissals are not arbitrary or capricious.” **ULP #30-79**

“The intent of the Parties to the collective bargaining agreement surely must be to allow a nontenured teacher to submit the matter of nonrenewal to arbitration.... The collective bargaining agreement language is an extension of the procedure outlined in the statute.... In **Milberry vs. Board of Education, 354 A.2d 559, 92 LRRM 2455 (1976)**, the Supreme Court of Pennsylvania addressed such a situation ... [and] concluded, ‘all the parties have done is to afford the teacher a further procedural protection’.” **ULP #30-79**

The public employer is “required to negotiate the subject of termination for cause with the union.” **ULPs #31-79 and #43-79**

“[T]he tort of wrongful discharge may apply to an at will employment situation. In fact, the theory of wrongful discharge has developed in response to the harshness of the application of the at will doctrine, under which an employment may be terminated without cause.” **Nye vs. Department of Livestock (1982)**

“Administration rules may be the sources of a public policy which would support a claim of wrongful discharge.... We find that the Department of Livestock failed to apply its own regulations to Margaret Nye, and thereby violated public policy.” **Nye v. Department of Livestock (1982)**

The statute requiring a hearing for suspensions or terminations of employees was applicable only in situations where violations of rules or the neglect of duty were involved. However, a fire fighter who was terminated for physical disability had a property interest in his position after the probationary period had been satisfied. Therefore he had to have an opportunity to be heard by an impartial tribunal before he could be terminated. Without such a hearing, the employer’s decision to terminate his was void. Consequently the fire fighter was entitled to full pay and benefits from the date of his termination until the final disposition of his case. **Welsh v. Great Falls (1984)**

See also **Savage Education Association v. Richland County School Districts (1984)**, **Bridger Education Association v. Carbon County School**

District No. 2 (1984), Great Falls and Raynes v. Johnson (1985), In the Matter of Raynes (1985), and ULP #28-76 Montana Supreme Court (1979).

43.31: Promotion, Demotion and Transfer – Promotion

Promotion is a mandatory subject for bargaining. **ULP #5-77**

43.311: Promotion, Demotion and Transfer – Promotion Procedures

See **ULP #17-78**.

43.312: Promotion, Demotion and Transfer – Promotion Standards

“Section **59-907 RCM 1947** makes anything relevant to the determination of classifications negotiable. That amendment ... imposes an obligation on the state to bargain on classification....” **ULP #17-78**

“[T]he conflict between the Defendant’s mandate to review and adjust classifications and the management prerogative on job classifications set forth in Section 59-1603(2) ... must be resolved in favor of the obligation to bargain collectively on classification matters.” **UILP #17-78**

43.3121: Promotion, Demotion and Transfer – Promotion Standards – Seniority

Seniority is a mandatory subject for bargaining. **ULP #5-77**

43.35: Promotion, Demotion and Transfer – Transfer

Transfer procedures are mandatory subjects of bargaining. The transfer decisions themselves are management rights **ULP #5-77**

43.352: Promotion, Demotion and Transfer – Involuntary Transfer

Section **1603(2) RCM 1947** was cited as the basis for the school board having the right to “... transfer and assign ... employees.” **ULP #16-75**

43.41: Job Content and Scheduling – Job Description

“The ‘definition of bargaining unit work’ is now clearly recognized by the National Labor Relations Board as a mandatory subject for collective bargaining.” **ULP #13-74**

43.42: Job Content and Scheduling – Assignment

“The right to assign is a management right and inability to make assignments could cause great harm to the school district. However, the effect of mis-

assignment of a teacher may have significant adverse effects on the individual teacher....” In other words, “assignment of teachers is a permissive subject of bargaining while the effect of those assignments is mandatory.” **ULP #5-77**

43.422: Job Content and Scheduling – Assignment – Change

The transfer and assignment of teachers in the School District has been a matter of district policy and not of contractual agreement. Therefore, unilateral change is justified if it is not based on discrimination for union activities. **ULP #16-75**

“[R]eassignment, without reduction in salary, for legitimate financial constraints, is justifiable and not contrary to tenure laws. **Sorlie v. School District (1983)**

43.432: Job Content and Scheduling — Scheduling — Change of Schedule

“The fact that Ms. Sisk’s hours were listed on several documents on a five day eight hour shift basis does not support the conclusion the four tens were temporary. The listing of Ms. Sisk as working five eights is found to have occurred as a method of fiscally listing her pay but not reflecting either the permanency or temporary nature of the scheduling. The permanency is found based upon the length of time, 15 months, and the lack of any documents or concurrent comments from the Superintendent regarding the temporary nature of the change or complaints which were ultimately the basis for the change back to five eights.” **ULP #7-91.**

43.44: Job Content and Scheduling – Hours

“[T]he time school begins is a permissible subject of bargaining.” **ULP #13-76**

“With the amount of time required for lunch duty and preparation being a *balance* against a yearly salary, I can only see these items as having a direct impact on the well-being of the individual teachers. Therefore ... [they] are negotiable items.” **ULP #20-78**

“As to the question of application of the four ten work week **39-4-107 (3) MCA** provides that there must be an agreement between the employer and the employees regardless of whether there are collective bargaining agreements. The law also provides that the days must be consecutive. Flathead County has not implemented a schedule of four ten hour work days.” **ULP #7-89.**

43.51: Job Security – Tenure

See **ULP #31-79.**

43.53: Job Security – Reduction in Force or Layoff

See **ULPs #5-77 and #30-80.**

43.531: Job Security – Reduction in Force or Layoff- Procedure

“[L]ack of procedure for lay-offs would have a substantially greater impact on the well-being of the individual teacher than on the operation of the school district as a whole. That is, in a district with a declining enrollment and no reduction-in-force policy, more individual teachers would be likely to suffer anxiety about an impending lay-off than in a district with a predictable policy. A procedure for lay-offs and re-hires is an mandatory subject of bargaining.” **ULP #5-77**

See also **ULP #7-78.**

43.54: Subcontracting

Public employers have the responsibility to bargain on work to be subcontracted out if it affects any member of a collective bargaining unit. Subcontracting cannot be used as an anti-union weapon. To use the possibility of subcontracting as a weapon to delay negotiations is not good-faith bargaining. **ULPs4-76 and #3-75**

“The NLRB has ... dealt with the issue of subcontracting ... on an 8(a)(5) charge, failure to bargain in good faith, which is similar to our section 59-1605(3).... The NLRB states that bargaining on sub-contracting is not required where: (A) ... [it is] motivated solely by economic reasons; (B) it has been customary for the company to subcontract various kinds of work; (C) no substantial variance is shown in kind or degree from the established past practice of the employer; (D) no significant detriment results to employees in the unit; and (E) the union has had an opportunity to bargain about changes in existing subcontracting practices at general negotiating meetings.” **ULP #18-78**

ULP #18-82 did *not* address various questions related to the School District’s right to subcontract.

Following National Labor Relations Board case precedents, “a conclusion that subcontracting of collective bargaining unit work is a mandatory subject of bargaining under the National Labor Relations Act is in order. Because of the similarity between the Montana Collective Bargaining for Public Employees Act and the National Labor Relations Act and because of the Board of Personnel Appeals’ action is ULP #3-75, ULP #18-78, and ULP #30-80, a conclusion that subcontracting of collective bargaining unit work is a mandatory subject of bargaining under the Montana Collective Bargaining for Public Employees Act is in order.” **ULP #9-83**

In **Fibreboard v. NLRB (1964)**, “the National Labor Relations Board states that bargaining on subcontracting is not required where: (A) the subcontracting is motivated solely by economic reasons; (B) it has been customary for the company to subcontract various kinds of work; (C) no substantial variance is shown in kind or degree from the established past practice of the employer; (D) the union has had an opportunity to bargain about changes in existing subcontracting practices at general negotiating meetings.” **ULP #9-83**

See also **ULP #30-80**.

43.541: Job Security – Subcontracting – Procedure

“Reading both sections [in the collective bargaining agreement] together, we find that Management Rights include the right to contract or subcontract work that directly impacts the Union or its members provided *first*, that management does an evaluation of the total economics involved in that operation as it relates to the public good and provided *second*, that management’s purpose or intent (motivation) of subcontracting is not to undermine the Union or to discriminate against its members.” **ULP #9-83**

43.61: Special Subjects – Education

See **ULP #5-77**.

43.616: Special Subjects – Education – Inservice Days

See **ULP #5-77**.

43.619 Special Subjects – Education – Non-Teaching Duties

See **ULP #20-78**.

43.621: Special Subjects – Planning Period

See **ULP #20-78**.

43.622: Special Subjects – Education – School Calendar

“Changes in school calendar ... is a mandatory subject of bargaining.... [It] ultimately deals with hours of employment which are specified in the Act as a subject upon which the employer must bargain.” **UL #5-77**

43.623: Special Subjects – Education – School Discipline

The proposal to “set up a school Discipline Review Committee ... is a permissive ... subject of bargaining.... This determination is confined to this

specific proposal; there may be other proposals which would be considered mandatory and not permissive.” **ULP #5-77**

43.624: Special Subjects – Education – Teacher Evaluations

“[E]valuation procedures are mandatory subjects of bargaining under our collective bargaining statute.” **ULP #43-79**

See also **ULPs #16-75 and #13-76**.

43.64: Special Subjects – Police and Fire

See **Billings Fire Fighters Local 521 v. Billings (1985)**.

43.7: General Agreement Provisions

A collective bargaining agreement is not a condition precedent to the issuance of individual teacher contracts. **Billings Education Association v. District Court (1974)**

“The Department should either comply with the recognition provision of its contract or submit the dispute to arbitration, as provided in Article XIII or its contract.” **DC #5-75 District Court (1979)**

“[I]ndividual contracts is ... a provision which does not need to be bargained. Individual contracts must conform to the master agreement signed with the exclusive representative.... The effect of the time contracts are issued may have great impact on the individual teacher; it will have little impact on the school district which has to, in any event, issue individual contracts.” **ULP #5-77**

“Sensible negotiators will automatically include a savings clause [to protect the body of the Agreement is an individual section should prove to be illegal] in a contract.... [It] should not have to be bargained. **ULP #5-77**

An agreement duplication and distribution provision is a mandatory subject for bargaining.” **ULP #5-77**

“A properly drawn nondiscrimination clause can be considered a mandatory subject of bargaining.” According to the Montana Human Rights Act, “workers are protected against discrimination for race, creed, age, and sex.” **ULP #5-77**

Bargaining related to a recognition clause was addressed in **ULP #19-78**.

“[If] the same Union receives a majority of the votes in Units 1 and 3 then the question of the merger of Units 1 and 3 into the same unit may properly be raised by the Employer as a subject of collective bargaining.” **UD #1-79**

Bargaining related to a work preservation clause was addressed in **ULP #29-79**.

43.72: General Agreement Provisions – Grandfather Clause

See **ULP #2-73**.

43.73: General Agreement Provisions – Grievances – Arbitration [See also 47.5.]

“Had either party contended in their complaint that the other had a duty pursuant to the agreement to submit the issue of wages, after the period of the wage re-opener, to compulsory and binding arbitration, the Hearing Examiner would have concurred. However, neither party has expressed their complaint in these terms and both parties expressly agree that the contract does not require binding and compulsory arbitration with regard to the issue of the wage re-opener and wages after the period of the wage re-opener.” **ULP #14-74**

“It is well settled that terminations and grievance procedures are negotiable subjects.” **ULP #18-83**

43.74: General Agreement Provisions – No-Strike Clause

“The crucial question involved ... is whether or not the no-strike provision of the contract is enforceable against the Union with regard to the issue of wages after the period of the wage re-opener, since it is the complete agreement of the parties that the duty of compulsory arbitration does not apply to wages after the period of the wage re-opener.... I hold that the no-strike clause in the union contract does not apply to the matter of the wage re-opener.” **ULP #14-74**

43.78: General Agreement Provisions — Zipper Clause

“The Board is well aware of NLRB, federal appellate and state court decisions requiring precise language specifically waiving a particular right to bargain before finding a waiver of that particular bargaining right. Those jurisdictions do not interpret general waivers such as zipper clauses as waiving specific bargaining rights. We disagree with this interpretation.” **ULP #17-87**

“Zipper clause waivers like the one at issue here are just as specific. The parties have clearly waived their right to bargain regarding any subject matter, whether specifically referred to in the contract or never considered by either party. A waiver containing language whereby the parties clearly and unambiguously agree to waive any and all bargaining rights should be given effect. ***State v. Maine State Employees Association*, 499 A.2d 1228 (1985)** and ***NLRB v. Southern Materials Co.*, 477 F.2d 15 (4th Cir. 1971)**.” **ULP #17-87**

The decision of the Board of Personnel Appeals “turned on the issue of waiver rather than on whether the action of the Division actually constituted an unfair labor practice. This, therefore, is the issue which the Court must review.” The question of law is: “[D]id Article 23 of the Collective Bargaining Agreement constitute a waiver of MPEA’s right to bargain during the term of the agreement?” **ULP #17-87 District Court (1989).**

“The court cases cited by MPEA are distinguishable in that while they stand for the principle that waiver of a collective bargaining right must be in ‘clear and unmistakable’ contract language, none of them specifically construe the impact of a broadly worded ‘zipper clause.’” **ULP #17-87 District Court (1989).**

43.8: Union Security [See also 24.22.]

“It is elementary that a union security clause is mandatory subject of bargaining.” **ULP #16-83**

The “Montana Collective Bargaining for Public Employees Act specifically authorizes union security clauses This statute clearly demonstrates that in Montana, such ‘union security’ clauses or devices are, as a matter of law, enforceable conditions of employment.” **ULP #16-83 District Court (1985)**

“The Department should either comply with the recognition provision of its contract or submit the dispute to arbitration, as provided in Article XIII of its contract.” **DC #5-75 District Court (1979)**

A “recognition clause” is a permissible subject of collective bargaining. **ULP #20-75.** See also **ULP #45-81.**

“A recognition clause is not a condition of employment; therefore, I must conclude that our statute does not require bargaining on the subject.” **ULP #19-78.** See also **UC #1-81.**

See **ULP #29-84.**

43.84: Union Security – Dues Check Off [See also 24.131 and 24.14.]

“Section **39-31-201 MCA** is mandatory and therefore obligates the public employer to deduct union dues from an employee’s pay Unlike wages, hours and other conditions of employment upon which both parties are required to bargain in good faith, but about which neither is required to make a concession, dues deduction is mandated by statute and cannot be altered by the parties unless both agree.” **ULP #29-84**

See **ULP #29-84.**

43.9: Rights of Management [See also 43.79, 72.33, 72.35, 72.58, and 72.665.]

“[T]he existence of a management rights section in the statute must be held to have some meaning. That section coupled with the balancing tests used by the courts in other jurisdictions compel the conclusion that the proposal, as written, [‘Before making any changes in the program, management shall consult with program managers’], is not mandatory subject of collective bargaining.” **DR #1-80**

43.94: Rights of Management – Standards of Performance

A maintenance of standards provision is ultimately related to working conditions and therefore is a mandatory subject of bargaining. **ULP #5-77**

“Had the School Board established an attendance policy applying to every member under the union contract, then the unilateral initiation of a more dependable method to enforce this attendance policy would have been merely a change from the established rule [It] would have been a managerial prerogative.” **Butte Teachers’ Union v. Silver Bow School District (1977)**

43.95: Rights of Management – Elimination of Services

“[R]eassignment, without reduction in salary, for legitimate financial constraints is justifiable and not contrary to tenure laws.... [I]f a position similar to that previously held by the reassigned educator is available after program reduction or changes it *must* be offered to that person.” **Sorlie v. School District (1983)**

43.98: Rights of Management – Selection and Direction of Personnel

An employer is not obligated to assign work to a given individual if it was not intended for him by the contract. **ULP #3-75**

“During the negotiations on [the issues of wages and insurance] the Association attempted to insert a clause on duty hours and schedules. The Board refused to negotiate on this clause maintaining that it was not open to negotiations. I would agree with the Board on this point.” **ULP #14-76**

“[R]eassignment, without reduction in salary, for legitimate financial constraints is justifiable and not contrary to tenure laws.” **Sorlie v. School District (1983)**

43.99: Rights of Management – Discipline and Discharge [See also 43.23.]

“Did the negotiated collective bargaining agreement change any of the rights, duties or powers delegated to the School District?” The Hearing Examiner found that “the Defendant has retained the ‘sole discretion’ to employ or dismiss

teachers. The arbitration provision provides a review process to ensure that teacher dismissals are not arbitrary or capricious.” **ULP #30-79**

“Discharge has long been recognized as a mandatory subject of bargaining by the NLRB....” **ULP #31-79**

“[D]iscipline is a mandatory subject of bargaining.” **ULP #16-81**